Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HABER ET AL., DEFENDANTS IN ERROR.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Missouri, Kansas & Texas Railway Company, plaintiff in error herein, respectfully presents its petition for rehearing, and submits the following reasons why its prayer should be granted: —

I.

Our first contention in support of this petition is that the court in its opinion has overlooked the legal proposition that the act of Congress on which the railway company relied for its defense does regulate and govern the civil

liability of the railway company. In the 10th specification of error in our original brief, page 68, we claimed that the civil liability, if any, of the railway company arose under the act of Congress.

That assignment of error reads as follows: —

> "10. The said Supreme Court erred in not holding that the defendant company was, and could, in no way be held responsible for the act of transportation of the Texas cattle in question from Texas to Kansas, and that its liability therefor, if any, could only be a liability arising under the laws of the United States."

At page 50 of our original brief we stated among the reasons why the railway company could not be held liable: —

> "4. Because even if the Texas cattle in question "were capable of communicating the Texas or Spanish "fever to the Kansas cattle and the defendant com- "pany knew that fact (which it did not as conclusively "shown by the special findings of the jury), then the "liability of the defendant company, if any, could be "based only on the Federal law and not on the State "law. If, as in the opinion of the Supreme Court of "Kansas (Tr. 289–297) intimated, the defendant vio- "lated Sec. 6 of the act of Congress of May 29th, "1884, in transporting the Texas cattle, then the "defendant could be sued therefor only under the "Federal statute, and if such suit had been brought "the defendant would have had the right to remove "the case to the United States Circuit Court of Kansas "and had it there tried according to the methods of "procedure of that court. It is a universal and fun- "damental rule of pleading in Kansas, as elsewhere, "that when a suit is founded upon a statute the same

"must be plead. The claimants have never sued on "the Federal statute, but have sued alone on the "Kansas statute."

See also our original brief, pp. 91 to 101, specially pp. 94, 95 and 96, where we show that the act of Congress covers the entire subject of transporting cattle, including civil liability, from one State to another.

The court seems to have overlooked the foregoing assignment and the foregoing proposition contained in our brief touching it, and to have assumed that the act of Congress in no way dealt with the question of civil liability, and therefore the State of Kansas was left free to deal with that question. We have read and reread with painstaking care the opinion of this court, and we understand that it distinctly concedes that Congress had the right to legislate touching the civil liability and if it had in fact so legislated that any legislation of the State upon that subject would have to give way as in conflict with the act of Congress. We certainly do not understand the court as expressing any serious doubt upon the proposition that it was competent for Congress to legislate upon the subject of civil liability.

The Supreme Court of Kansas, in its opinion (Tr., p. 292) after quoting Sec. 6 of the act of Congress, said:—

"But the first clause of Sec. 6 expressly prohibits "any railroad company from transporting from one "State or Territory to another any live stock affected "with any communicable disease. The last clause of "this section expressly recognizes the existence of "such a disease as splenetic or Texas fever, but "exempts cattle affected with it from the provisions "of the act when being transported by rail to market

" for slaughter when the same are unloaded only for
" the purpose of feeding and watering on the way.
" The grant of permission to transport to market for
" slaughter emphasizes the prohibition contained in
" the preceding portion of the section against the
" transportation for other purposes of cattle capable
" of communicating disease. It clearly was not the
" purpose of Congress to authorize cattle capable
" of imparting Texas fever to be brought into Kansas
" and communicate the disease to the domestic herds
" of this State. On the other hand, this section
" expressly prohibits the company from doing so."

When we prepared our original brief for this court we knew that counsel for the claimants had in the Supreme Court of Kansas claimed that the judgments of the State District court should be affirmed because the railway company was civilly liable under the act of Congress as well as that of the State, and we anticipated that they would make the same claim here, and therefore we asserted in our original brief, though not alluded to in the oral argument, that the judgment of the Supreme Court of Kansas could only be upheld as such under the Kansas statute, for that statute was alone sued upon. At no stage of the case did counsel for claimants assert that Congress could not regulate the question of civil liability and of course we may assume that this court will not allow the case at bar to pass off upon the question of the denial of the right of Congress to make such regulation. The statute of Kansas sued on, as construed first by the claimants, next by the District Court of Kansas, and then by the Supreme Court of Kansas, and which construction is upheld by this court, imposes a liability upon the railway company for bringing cattle into the State if it knew, or by due diligence could have known, that the cattle were capable of

communicating the Texas fever, though the fever was not in fact communicated until long after the cattle had passed at their railroad destination from the railway company to their owners, and had been driven by their owners across Lyon County into Chase County, Kansas. The liability of the railroad company was therefore based under the Kansas law on the company's act of transporting the cattle across the State line of Kansas, and not for transporting them into Chase county, nor for the communication of the disease while they were in the possession of the railroad company. The opinion of this court assumes that the act of Congress related only to a criminal liability on the part of the railroad company for knowingly bringing the cattle into the State, and did not cover a civil liability on the part of the railroad company. As we read the opinion, we can but conclude that the decision of this court would have been different if the court had understood that the act of Congress regulated the question of civil liability. Our distinct proposition in this part of our petition upon which we ask a rehearing is that this court has inadvertently overlooked the proper construction of Sec. 6 of the act of Congress which, as we claim, created a civil liability, and that the claimants could have based their action upon that section, and have recovered their losses if they had shown by proper averments and proofs that it had been violated to their damage.

That this court acted under an erroneous impression that Sec. 6 construed in the light of other portions of the act of Congress created no civil liability is shown by the following extract from the printed opinion before us, page 6 :—

> " Whether a corporation transporting, or a person
> " causing to be transported, from one State to another,
> " cattle of the class specified in the Kansas statute

"should be liable in a civil action for any damages "sustained by the owners of domestic cattle by reason "of the introduction into their State of such diseased "cattle is a subject about which the Animal Industry "act did not make any provision."

In a word, this court decides that the Federal act did not fix any civil liability upon carriers for transporting diseased cattle, but that that liability was left, as before the passage of the act, to be determined under general principles of law or under some State enactment.

Section 6 of the Federal act prescribes:—

"That no railroad company within the United "States or the owners or masters of any steam or "sailing vessel or boat, shall receive for transport- "ation or transport from one State or Territory to "another, or from any State into the District of Co- "lumbia, or from the District into any State, any "live stock affected with any contagious, infectious "or communicable disease, and especially the disease "known as pleuro pneumonia."

While Section 7 of the act in express words only prescribes a penalty for the violation of Section 6, yet it cannot be doubted under the well-settled rule supported by an overwhelming weight of authority that a civil cause of action at the same time arises in favor of any one who can show himself damaged by reason of a railroad company violating Section 6 in the transportation of cattle therein prohibited, and being exactly the same liability for the same kind of cattle affected by the same kind of disease covered by the Kansas act, and in which a civil liability is prescribed in so many words. While the Federal act does

not prescribe a civil liability in words, yet in law it does. The fact that there is a penalty provided for the violation of the statute, payable to the United States, and that a civil liability is not in express words mentioned, does not prevent those who have been specially injured by its violation from recovering damages therefor. "For where a duty imposed," says Mr. Cooley in his work on Torts, First Edition, page 654, "is obviously meant to be a public duty, and a penalty for its violation is made payable to the State or to an informer, the right of an individual injured to maintain an action on the case for breach of the duty owing to him is unquestioned." And Shearman and Redfield, in their work on Negligence, Sec. 13, say:—

> "The violation of a statute of the United States may be made the basis for an action of negligence in a State court. These principles apply not only where a statute or ordinance discloses that persons violating it shall be liable for any damages sustained by reason of its breach, *but also where it contains no such provisions, and simply imposes a penalty by way of fine or otherwise for its disobedience.*"

In support of this text, the learned authors cite Bishop on Non-contract Law, Sec. 126; Comyn Dig. Action on Statute F.; Hayes *v.* Railroad Co., 111 U. S. 228.

Section 4386 of the Revised Statutes of the United States provides that:—

> "No railroad company within the United States, "whose road forms any part of a line of road over "which cattle, sheep, swine, or other animals are con- "veyed from one State to another, or the owners or "masters of steam, sailing, or other vessels carrying "or transporting cattle, sheep, swine, or other animals "from one State to another, shall confine the same in

"cars, boats, or vessels of any description, for a "longer period than twenty-eight consecutive hours, "without unloading the same for rest, water, and "feeding, for a period of at least five consecutive "hours, unless prevented from so unloading by storm "or other accidental causes. In estimating such con- "finement the time during which the animals have "been confined without such rest on connecting roads "from which they are received shall be included, it "being the intent of this section to prohibit their con- "tinuous confinement beyond the period of twenty- "eight hours, except upon contingencies hereinbefore stated."

And section 4388 provides a penalty for failure to comply with foregoing section of from $100 to $500.

And while no civil liability is fixed for the violation of this statute, it has been repeatedly held that a cause of action arises upon a violation of the statute in favor of anyone damaged thereby.

Chesapeake & Ohio Ry. *v.* American Exchange Bank, 23 S. E. Rep. 935 (Supreme Court of Appeals of Va.);

Railway Co. *v.* Haggie, 86 Georgia, 210 (*s. c.* 12 S. E. Rep. 363);

See to same general effect Carroll *v.* Railroad Company, 58 N. Y. 126;

Railway Co. *v.* Daggett, 28 S. W. Rep. 524 (Supreme Court of Texas).

So in the case of Grey *v.* Trade Co., 55 Alabama, 387, it was held that where a cargo of cotton was received by a carrier for transportation and was destroyed by fire on a boat, the carrier could not avail himself of an exemption from liability for loss by fire if he neglected to protect the

cotton on the deck of the vessel by a complete and suitable cover of canvas or other suitable material to prevent ignition by sparks as required under penalty by an act of Congress, but which gave no civil action in express terms.

In Hilliard on the Law of Torts, Sec. 26 (4th Edition), it is said:—

> "An unlawful act may be committed in violation of some express statute, and this class of torts requires special notice. It is said where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be an injury to another, though no action be given in express terms, by the law of the omission or commission, the general rule of law in all such cases is that the party so injured shall have an action." Citing

Ashby *v.* White, 2 Ld. Raym. 953, per Lord Holt, C. J.; 6th Exch. 752; 7th Exch. 460;
Burson *v.* Cowles, 25 Cal. 535.

Ray in his work on Negligence of Imposed Duties, page 662, says:—

> "It is a general rule that when one who owes another a duty, whether such duty is one assumed by a voluntary contract or imposed by a statute, a breach of such duty gives a cause of action. Duty and right are correlative, and the duty being imposed the right to have it performed results to the person interested." Citing

Hover *v.* Barkoff, 44 N. Y. 113;
Jetter *v.* N. Y. & Hudson R. R. Co., 2 Abb. App. Dec. 458;
Heeney *v.* Sprague, 11 R. I. 456;
Couch *v.* Steel, 3 L. & E. L. and B. L. 402;
Willy *v.* Mulledy, 78 N. Y. 310.

In Comyn's Digest, title Action upon Statute, F., it is stated as the rule that:—

> "In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law."

Upon this question, in the leading case of Hayes *v.* Mich. Central Ry. Co., 111 U. S. 228, where this court considered the question of liability of a railroad company for failing to fence its road as required by statute and when no right to damages was expressly given, this court said:—

> "It is said, however, that it does not follow that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of Atkinson *v.* Newcastle Water Works Co., L. R. 2 Exch. Div. 441, as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in Couch *v.* Steel, 3 E. & B. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed," we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to

persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. "The nature of the duty," said Judge Cooley in Taylor *v.* L. S. & M. S. R. Company, 45 Mich. 74, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit." (See also, Railroad Company *v.* Terhune, 50 Ill. 151; Schmidt *v.* The Milwaukee & St. Paul Railway Company, 23 Wis. 186; Siemers *v.* Eisen, 54 Cal. 418; Galena & Chicago Union Railroad Company *v.* Loomis, 13 Ill. 548; O. & M. Railroad Company *v.* McClelland, 25 Ill. 140; St. L. V. & T. H. Railroad Company *v.* Dunn, 78 Ill. 197; Massoth *v.* Delaware & Hudson Canal Company, 64 N. Y. 521; B. & O. Railroad Company *v.* State, 29 Md. 252; Pollock *v.* Eastern Railroad Company, 124 Mass. 158; Cooley on Torts, 657.")

In A. T. & S. F. Ry. *v* Reesman, Circuit Court of Appeals, 8th Circuit, 60 Fed. Rep. 370, it was held (following Hayes *v.* R. R. Co., *supra*), Justice Brewer delivering the opinion: "When through the failure of a railroad company as required by Revised Statutes of Missouri, 1889, Sec. 2611, an animal gets on the track causing derailment of the train an employee on the train who is injured by the accident is entitled to sue the company since such statutes are designed to protect persons on trains as well as cattle owners." The Missouri statute in question did not give any civil action to trainmen, but gave such action to the cattle owner. See to same effect Donnegan *v.* Erhardte, 119 N. Y. 468. See also Quackenbush *v.* Railroad Co., 62 Wis. 411.

In Couch *v.* Steel, 3 E. & B. 402, a shipowner having neglected a statutory duty of keeping on board a supply of medicine, it was held that a sailor whose health had been injured for want of such medicines could maintain his action though the statute did not in express terms give an action for damages.

The preamble of the act 32 & 33 Vict. c. 70 known as the Contagious Disease Act of 1869, explained its purpose:—

> "Whereas it is expedient to confer on her Majesty's "most honorable Privy Council powers to take meas- "ures as may appear from time to time necessary to "prevent the introduction into Great Britain of con- "tagious or infectious diseases among cattle, sheep "and other animals by prohibiting or regulating the "importation of foreign animals and it is further expe- "dient to provide against the spreading of diseases in "Great Britain."

In Gorris and another *v.* Scott, L. R. 9 Exc. 125 (1874), where plaintiff sued on that act for loss of some sheep which were washed overboard by reason of an alleged failure to comply with certain regulations contained in the act and other regulations of the Privy Council made in the exercise of power vested in them by the act, it was held by Kelly, C. B., Pigott, B., Pollock, B., and Amphlett, B., in concurring opinions, that the act was not to protect against disasters at sea but that its object and purpose was "to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact," and it was admitted that an action would lie thereunder by any one damaged by the dissemination of disease as a result of a violation of the statute, though it

only provided a penalty and did not in words give a civil action.

In Bouvier's Law Dictionary, title Torts, it is said: —

> "In general it may be said, that whenever the law creates a right, the violation of such right will be a tort; and whenever the law creates a duty, the breach of such duty, coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute."

So we undertake to say that both the Federal act and the Kansas act prescribe a civil liability, and as to the rule of civil liability there is a clear conflict; the Kansas act providing that the carrier shall be *prima facie* liable if the cattle come from south of the 37th parallel, while the Federal act *ex vi termini*, only subjects the carrier to an action for damages when it knowingly violates the act, and it is manifestly true that should a party sue for damages under the Federal act, as we have seen he undoubtedly could, the carrier could plead its compliance with the quarantine and the rules and regulations prescribed by the Bureau as a defense, or at least as evidence of its not knowing their diseased condition. The suit alleging the violation of the act of Congress and consequent damage would be one arising under the constitution and laws of the United States and could be brought originally in the Federal court, or if brought first in the State court removed to the Federal court.

Belden *v.* Chase, 150 U. S. 674;
Lowry *v.* C. B. & Q. R. Co., 46 Fed. R. 83;
In re Lennon, 166 U. S. 548.

What object and purpose did Congress have in view in prohibiting carriers from transporting Texas cattle affected with the communicable disease of Texas fever except for immediate slaughter from one State to another? Every word and sentence of the act from beginning to end shows that it was to prevent the spread of the disease of Texas fever, and the consequent ravages which it would have upon the domestic cattle of the various States, including the State of Kansas. The prohibitions of the Federal statute were therefore for the protection and benefit of the owners of domestic cattle. If such was the object and purpose of the Federal statute, then all of the well-considered authorities which we have cited, without a dissenting voice, hold that out of the violation of such a statute arises a civil liability in favor of the owners of domestic cattle. Is this court in view of the opinion which it evidently holds of the importance of legislation touching the subject of the spread of disease among cattle, content to hold, as it does in the opinion in this case, that no civil liability arises from the act of Congress in question? Is it not true, in the light of the authorities which we have cited, that if the railroad companies of this country carry cattle into any of the States or Territories of the Union affected with the communicable disease of Texas fever, and spread the ravages of that disease among the domestic herds in violation of the Federal statute, that the owners of such cattle have the right to a civil action for damages against such companies based on the prohibitions of that statute? If such be the true construction of the act of Congress, then is it competent for the States to burden interstate commerce with an additional or the same liability under State laws? If the opinion of this court is to stand, and it is to be held that no civil liability arises under the Federal statute, does it not strip this Congressional legislation of the protection and benefit which it was meant to

afford to the owners of domestic herds? The case at bar was tried by the courts below on the theory that the Federal statute, the rules and regulations of the Department of Agriculture and the quarantine line established by the Federal authorities had no bearing upon the question of civil liability either as evidence or as a defense, and the case has been decided upon the theory that no civil liability arose from the Federal statute, and we trust that what we have hereinbefore said will impress the court with the importance of having that question thoroughly argued, which can only be done if our petition for rehearing is granted.

II.

We earnestly ask a rehearing on the further ground that this court, in its opinion, omitted to pass upon three certain assignments or specifications of error (Nos. 3, 4 and 11), asserted and urged in the original brief of plaintiff in error. These alleged errors relate to the exclusion of testimony offered at the trial by the defendant railway company, and are as follows:—

> "3. The Supreme Court erred in refusing to reverse "the judgments of the said District Court for its "refusal to admit in evidence the regulations of the "Department of Agriculture of the United States, "which are in words and figures as follows:— "

(Here follow the regulations concerning cattle transportation of the Department of Agriculture, dated February 26, 1892, and which are set out in full in the assignment of error.)

See pages 51 to 56 of appellant's original brief.

"4. The Supreme Court erred in refusing to reverse "the judgments of said District Court for its refusal "to admit the testimony of A. T. Drew and M. "Sweeney to the effect that the defendant railway "company in the shipment of the Texas cattle in "question conformed to the foregoing regulations of "the Department of Agriculture."

See appellant's original brief, page 56.
See Transcript of Record, pp. 204–231.

"11. The Supreme Court erred in refusing to "reverse the judgments of said District Court for its "refusal to admit in evidence the two permits of the "Live Stock Sanitary Commission of Kansas signed "by order of said commission, by Albert Dean, In-"spector, who was also Live Stock Inspector for the "Bureau of Animal Industry of the Department of "Agriculture of the United States, the said permits "being Exhibits I and J to the answer of the defend-"ant railway company (Tr. 29), and being in words "and figures as follows, to wit:—

EXHIBIT "I."

"State of Kansas:

"CATTLE INSPECTOR'S OFFICE,
"KANSAS CITY, KANSAS, April 24th, 1892.

"The Missouri, Kansas & Texas Railroad Company "is hereby permitted to ship to Hartford, Kansas, "1,501 head of cattle, consigned to Hosier Brothers.

"Said cattle are shown by affidavit in this office to "have been from Pecos county, Texas. These cattle "are branded t $\overline{3}$ and other brands.

"By order of Live Stock Sanitary Commission.

"ALBERT DEAN, Inspector."

EXHIBIT "J."

"State of Kansas:—

"CATTLE INSPECTOR'S OFFICE,

"KANSAS CITY, KANSAS, June 3rd, 1892.

"The Missouri, Kansas & Texas Railroad Company "is hereby permitted to ship to Hartford, Kansas, "500 head of cattle, so consigned to Hosier Brothers.

"Said cattle are shown by affidavit in this office to "have been from Pecos county, Texas. These cattle "are branded t $\overline{3}$ and other brands.

"By order of Live Stock Sanitary Commission.

"ALBERT DEAN, Inspector."

See original brief of appellant, pages 68–69.
See Transcript of Record, pp. 231–2–4.

Assuming for the purposes of this part of our petition for rehearing that the Kansas statute, rightly construed, imposed the extraordinary civil liability upon the defendant for bringing cattle into the State which it knew or might by the exercise of due care have known to have been capable of communicating disease, though the disease was communicated after the cattle had passed from the possession of the railway company to that of their owners, and assuming, further, that the statute as thus construed is not in conflict with either the constitution or the laws of the United States, we earnestly contend that upon the questions of fact which were submitted to the jury touching the company's knowledge or negligence in not knowing the dangerous condition of the cattle that the defendant was entitled to have had considered by the jury the rules and regulations of the Department of Agriculture establishing the United States quarantine line and the method of transporting Texas cattle, therein prescribed by the Federal authorities, and also the permits issued by the inspector of

the Department of Agriculture of the United States, who was also the State inspector, permitting the company to bring these particular cattle into the State, and also the testimony of Sweeney and Drew, two of the railroad officers, to the effect that in the movement of these cattle the rules and regulations of the Department of Agriculture were in all respects observed. We specially claimed in our brief that the action of the court in ruling out each of these items of evidence was erroneous. Can there by any doubt that this evidence should have gone to the jury upon the question of the defendant's knowledge, or want of care in not knowing the dangerous condition of the cattle? The quarantine line of the Federal government, the rules and regulations of the Agricultural Department, the written permission of the State inspector, who was also the Federal inspector, were all part of the *res gestæ* of the transportation of the cattle, and showed the circumstances, surroundings and conditions under which they were moved. The Federal statutes authorized the Federal authorities to receive the co-operation of the State authorities, and the State statute authorized the State officers to co-operate with the Federal authorities. See Section 3 of the National Quarantine Law (p. 3 of opinion in this case), and Section 6826 of the State Law, pages 3 and 15 of appellant's original brief, and page 2 of the opinion of this court.

We ask the court to picture in its mind the trial of this case as it took place in the Lyon County District Court. There will be seen the jury, opposing counsel, the numerous claimants, and the ultimate questions to be decided by the jury — the railroad company's knowledge of or negligence in not knowing the dangerous condition of the cattle. How different does the case stand as it shall finally go to the jury, with or without this testimony which was excluded by the court. What stronger testimony could have been introduced showing the company did not know the dan-

gerous condition of the cattle or that it was not negligent in failing to ascertain their dangerous condition, than that the cattle came from a section where the health officers of the United States, acting under laws of Congress and rules of the Department of Agriculture thereby authorized, had said the fever did not exist, and from which cattle could be safely transported, and that they were moved under the rules and regulations of the Federal authorities and under the express permission of the State and Federal inspector. With this testimony excluded the case, as submitted to the jury, rested upon the *prima facie* proof prescribed by the Kansas statute, that the cattle having communicated the disease it must be presumed, in the absence of evidence to the contrary, that the defendant had full knowledge and notice of their capacity to communicate the disease. We undertake to say that any experienced fair-minded lawyer can only conclude that upon the state of the record, with the before enumerated testimony excluded, there would be no other result than a verdict for the claimants. With this testimony in evidence and before the jury, notwithstanding other disadvantages which need not be mentioned, but which will readily occur, under which the railroad company in that kind of a contest would labor, there would be a fair hope of securing a verdict from the jury that the company either had no actual knowledge of the condition of the cattle, or were not negligent in failing to know their condition. If the Federal and State inspectors, posted along the line of the railway to look out for Texas cattle capable of communicating the Texas fever, thought and concluded and decided, as part of the *res gestae* of the movement of these cattle, that they were not capable of communicating the disease, how strong the argument that the railroad company had no guilty knowledge or were not negligent in failing to have it. If the expert doctors, provided by both State and Federal

authority, officially ascertained and told the company that the cattle were not dangerous, was that not high evidence respecting the knowledge or negligence on the part of the company? The errors, therefore, of the Kansas courts in excluding this testimony are most manifest, and the only question remains as to whether the errors were of such a nature that we can avail ourselves of them in this court. This court in the opinion announced, entirely overlooked the points raised by us as to this testimony. We claim and will support by authority, to which we will immediately refer, that if the Federal quarantine and the rules and regulations of the Bureau of Agriculture, and the movement of the cattle in compliance therewith and the permission of the Federal and State inspector, had the effect as evidence in the railroad company's favor to support a material issue involved in the case, that we are entitled to the benefit of it as a Federal right, although it may not have been complete justification of the acts for which the railroad company is sued. By asking the court to consider whether the exclusion of this testimony was error we are not asking it to pass upon the facts and therefore the concluding sentence of the opinion that it cannot review the facts has no application and does not answer our contention.

If this testimony had been admitted and notwithstanding its probative force, the jury had still found that the railway company knew, or ought to have known, the dangerous condition of the cattle, it might well be that this court would not review the finding of facts of the jury though contrary to the weight of the evidence. The admissibility of this testimony, however, presents a different question, and one that a common law or Federal appellate court can and should determine.

Therefore, in again pressing these errors to the attention of this court for its serious consideration, we are not un-

mindful of the fact that a writ of error only brings up for review and determination questions of law, and that the court will not review the evidence "in order" as was said by Mr. Justice Story, "to ascertain whether the judge (or jury) rightly interpreted the evidence or drew right conclusions from it" (Hyde *v.* Booraem, 16 Pet. 169), nor have we overlooked the concluding paragraph of the court's opinion in the case at bar. We are not asking the court to review the verdict and findings of the jury from the *evidence offered and given to the jury*, but are asking this court to review and revise the action of the Supreme Court of Kansas in approving the act of the trial judge in excluding *from the* jury, competent and material evidence. In the case of Belden *v.* Chase, 150 U. S. 674, this court said:—

> "This court has jurisdiction to review the judgment "of the court of a State in an action at common law "to recover damages caused by the collision of two "steamers navigating the inland waters over which "the United States have admiralty jurisdiction, "*when* that judgment denies rights claimed by "the plaintiff in error under rules established by "statutes of the United States for preventing col- "lisions or rights regarding the application of such "rules."

There, a collision occurred on the Hudson River in the State of New York. Action for damages was brought in the State court against the owner of the yacht Yosemite "for so negligently navigating the yacht as to run down and sink the steamboat Vanderbilt" of plaintiff. On the part of the defendant in error it was contended that this court had no jurisdiction as the plaintiff in error had not shown he had any right under a United States statute which had been decided against him, and that the yacht sailing

on inland waters was controlled by the New York statute and local law and therefore no Federal statute was involved. On the other hand the plaintiff in error, the owner of the yacht, claimed that he was navigating his yacht agreeable to the rules prescribed by the Federal statute and agreeable to a code of rules prescribed by a Federal Board of Supervising Inspectors. There was a conflict between the State regulations and the Federal regulations. The plaintiff in error relied on his compliance with the Federal regulations, and asked the court to instruct accordingly, which the court refused to do. This court held that this raised a Federal question entitling the plaintiff in error to a review here, and further held that the rules prescribed by the Federal Supervising Inspectors had all the force of an act of Congress. Could there be a case more in point as showing the error of the trial court in excluding the testimony of which we complain? It is not a question of weighing evidence or reviewing the jury's conclusions upon the evidence before them, but of the court's decision against the competency and admissibility of Federal testimony. In Dower v. Richards, 151 U. S. 658, this distinction is clearly drawn by Mr. Justice Gray, for it is there said:—

> "When, indeed, the question decided by the State
> "court is not merely of the weight of evidence or
> "sufficiency of the evidence to prove a fact, *but* of the
> "competency and legal effect of the evidence as bear-
> "upon a question of Federal law, the decision may be
> "reviewed here."

And in Republican River Bridge Co. *v.* Kansas Pacific R. R. Co., 92 U. S. 315, Mr. Justice Miller said:—

> "In chancery cases or any other class of cases
> "where all the evidence becomes part of the record in

In Hall *v.* Jordan, 15 Wall. 393, it was held that the admission of an unstamped deed could be assigned as error in this court in a common law case brought from State Supreme Court.

"the highest court of the State, the same record being "brought here, this court can review the decision of "that court on both the law and the fact, *so far as* "*may be necessary* to determine the validity of the "right set up under the act of Congress."

As indicated in the beginning of this part of our petition, we need not here claim that the excluded testimony constituted a complete *defense* to the action, but all we need claim is that it tended to show that the company was justified in acting on the assumption that the Federal government would not mislead it as to the places and territories where infectious or communicable diseases existed, and that it could rely on such regulations and quarantine lines as a source of information provided by Federal law in conducting its business as a common carrier. Suppose an individual is sued for negligently communicating smallpox to his neighbor. Cannot the individual show in defense, if such is the fact, that he consulted doctors learned in medicine and was advised that he did not have smallpox? If the patient was received from Federal quarantine officials, who, in the course of their official duty, examined him and pronounced him not infected, could not the party sued offer those facts as tending to prove that he did not know the patient was diseased? Now in the case at bar the government of the United States, recognizing the importance of the question, established a special bureau to deal with this queer disease. The act creating the bureau provided for the appointment of a "competent veterinary surgeon" as the head of that bureau, "whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious and communicable diseases among them and the means for the prevention and cure of the same and

to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country, and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for the purpose not to exceed twenty persons at any one time" and then the Commissioner of Agriculture is directed to "prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases," and it is made the duty of the Commissioner "to notify in writing the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select of the existence of said contagion, and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district who shall knowingly violate the provisions of section six of this act shall be guilty of a misdemeanor." Section six of the Federal act prohibits any railroad from transporting "any live stock affected with any contagious, infectious or communicable disease," and construed in the light of section seven, as we claim, renders the party transporting such cattle civilly as well as crimi ally liable when the carrier knows the cattle are diseased. The Federal government undertook to locate this disease and advise the railroads as to where it existed and where it did not exist, and the railroads are required, under penalties prescribed and prohibitions contained, to act conformably to the Federal goverment's advices and regulations. If the railroads act in violation of such advice and regulations, such violations may be used in evidence against the railroads in actions for damages. If the railroads comply with them, can they not show such compliance as evidence in their favor?

The State court in excluding this evidence, necessarily construed the Federal statute, and construed it against the contention of the plaintiff in error. When this evidence was offered, the court, of course, looked at the act of Congress and construed the act as not giving to the regulations and quarantine line any effect as contended for by the plaintiff in error — in fact held that the act of Congress and the regulations of the Department of Agriculture in conformity therewith, had no bearing at all upon the issues or any issue in the case.

The opinion of this court holds that the proper construction of the act and regulations is for the Federal courts and that they are not a complete defense in an action. We now ask this court to say if they are not a *partial* defense.

In other words, we ask this court to review the State court's construction of the legal effect to be given to the act of Congress and these regulations.

This case has not been rightfully tried. It will not be rightfully tried until this court lays down rules for the guidance of the Kansas courts as to the Federal rights of the company and their bearing on the issues. If the Kansas statute is constitutional still the act of Congress and the Federal quarantine line, and the Federal regulations, and the permission of the Federal inspector have important bearings on the determination of the controverted questions of fact, namely, the railway company's knowledge or negligence in not knowing of the dangerous condition of the cattle, and unless the Kansas courts permit these items of Federal evidence to be shown the railway company will be deprived of a right, privilege and immunity accorded to it under the Federal laws. The claim we now make as to this excluded testimony not having been yet decided by this court, we submit we should have an opportunity to be heard on this branch of the case.

III.

1st. The question involved in this case was as to the constitutionality of the provisions of the statute of Kansas, being Chapter 191 of the Laws of 1885 of that State as amended by Chapter 201 of the laws of 1891, enacted for the alleged purpose of protecting Kansas cattle against contagious diseases, and more especially against Texas fever. In the opinion of the court as delivered by Mr. Justice Harlan, it is stated that if the statute in question had been as oppressive as the plaintiff in error claimed it to be, the court might have declared the statute invalid; but that it was unnecessary to pass upon that question because the theory on which the plaintiff in the State court had framed his complaint and the instructions of the trial court to the jury showed that there was no such oppressive result caused by the statute as was charged. The opinion says:—

> "It is suggested that the statute is so drawn that the railway company would be liable, even if it acted in good faith, and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be — though upon that point we express no opinion — that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in *Railroad Co.* v. *Husen*. But we do not so construe the statute."

The opinion goes on to state that the trial court had instructed the jury that the proof must indicate knowledge

of the dangerous character of the cattle on the part of the railway company or at least such circumstances as should put the railway company on its guard, and this court seemed to think that such instruction was sufficient to rebut the claim of plaintiff in error as to the oppressive nature of the statute, because it showed that under the construction given to the statute by the State court no such oppression was practiced.

It is respectfully submitted that the court ignored another portion of the trial court's charge to the jury which appears to us to controvert what the opinion of this court states to be the purport of the charge as a whole. The trial court did, it is true, instruct the jury that the proof must indicate knowledge of the dangerous character of the cattle on the part of the railway company or such circumstances as should put the railway company on its guard, but it also specifically drew the attention of the jury to the fact that under the statute the mere fact that the cattle came from south of the southern boundary line of Kansas between the first day of February and the first day of December was *prima facie* evidence that such cattle were capable of communicating Texas fever and that the railway company had full knowledge of the cattle's ability to impart such disease: —

> "The statute of this State makes the fact of bringing away cattle from south of the south line of Kansas between the first day of February and the first day of December *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas splenic or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."
>
> Paragraph 5th of Trial Court's charge to the jury, Transcript of Rec., p. 268.

The answers of the jury to the special questions propounded to them (Transcript of Rec., pp. 272–274) show conclusively that there was no proof whatever of any knowledge on the part of the railway company of the dangerous condition of the cattle, so that knowledge was only inferentially imputed to the plaintiff in error through the operation of the statute. It is submitted, therefore, that the claim of the plaintiff in error as to the oppressive character of the statute is thus fully supported, inasmuch as the judgment of the State court could not have been sustained either from the standpoint of the common law or of Federal enactments, unless knowledge of the dangerous condition of the cattle was shown. No such knowledge was shown in the case at bar, and it was only on account of the presumption of knowledge created by the statute that the judgment against the railway company was rendered.

The provision of the statute making the fact that the cattle came from south of the southern boundary line of Kansas *prima facie* evidence of their liability to communicate disease and of knowledge on the part of the person driving or shipping them, might find justification, as this court suggests, in the fact "that Texas cattle when brought northward during the spring and summer months often carry the germs of fever, or are often, though not always, infected with fever that may be communicated by them to domestic cattle," but only if such a construction were given to the statute by the Kansas courts as to allow the presumption created by the statute of knowledge of the dangerous condition of the cattle to be overcome by proof that the carrier had no such knowledge and had no cause to believe after making reasonable inquiry that the cattle were dangerous. The Kansas court did not so construe the statute. On the contrary, its charge to the jury shows that in its view the presumption of knowledge created by the statute was tantamount to a conclusive presumption as

it was impossible to prove a negative. For that was the situation in the case at bar. There was absolutely no evidence except the presumption created by the law produced that would tend to fix upon the railway company in any degree the charge that it knew that the cattle were dangerous. The United States regulations, if they had no effect otherwise, certainly excused the duty of special inquiry, as they allowed shipments all the year round from the point whence these cattle came. The answers of the jury show this, and the fact that the jury in spite of such answers rendered — under the instructions of the trial court as to the presumption created by the statute — a verdict against the plaintiff, shows that the plaintiff in error's charge that the statute is oppressive and confiscatory in its operation is part of the undeniable record in this case.

If the interpretation placed upon the statute by the Kansas court had been what this court stated it to be, namely, "that damages shall not be recovered if from all the evidence it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the State" — the statute might be a reasonable one. But the interpretation of the statute by the Kansas court being altogether different, and construing that statute in such a way that knowledge is imputed to the carrier despite practically positive evidence to the contrary, and making the carrier liable for whatever damage may accrue from the carelessness of the consignee or others wholly strangers to the carrier to whom the infected cattle were delivered or under whose control they incidentally came, we respectfully submit that the statute cannot be supported as a reasonable enactment designed to protect the property of the State, but is an oppressive burden on the carrier of an important article of interstate traffic and therefore deprives the carrier of his property without due process of law.

2nd. The Kansas statute sued on is not an inspection law. It does not even assume to be such, but is avowedly a penal statute creating both a criminal and civil liability. Were it an inspection law, it would at least recognize some difference between cattle actually afflicted with disease and cattle not so afflicted. This court, until the present case, has never conceded to the States any greater power than that of keeping out from their borders property actually proved to be dangerous, and has not in the past supported any State enactment which went further than to prohibit the importation of such property and provide safeguards at the expense of the State for the determination of whether any particular article of commerce was dangerous or not, and which may be a burden on interstate commerce but is one which must be borne in the interest of society. In the present case, however, it has supported a law which in its practical workings and under the construction given to it by the Kansas courts, puts upon the carrier of interstate commerce the burden which should be borne by the health authorities of the State. This cannot be called a statute only indirectly affecting interstate commerce therefore. It is in its result as direct and absolute an interference with interstate commerce as has been before this court in any case, practically going as far in that direction as the statute under consideration in the *Railroad Co.* v. *Husen*, from which we contend that the case at bar cannot in principle be distinguished.

3d. The case of Kimmish *v.* Ball, 129 U. S. 217, which is cited in the opinion of this court as one directly in point, is, we respectfully suggest, entirely inapplicable. In that case the State of Iowa had passed a statute providing that any person *having in his possession* "Texas cattle" should be liable for any damages accruing from allowing them to run at large, and thereby spread the disease known

as "Texas fever." That statute had nothing whatever to do with interstate commerce, and applied merely to property belonging to and in the possession of citizens of the State and therefore *mingled with* the property properly under the jurisdiction of State laws. A previous section of the Iowa statute was directed against the importation of Texas cattle into the State of Iowa, except under certain restrictions, and the Supreme Court of the United States specifically distinguished between that section of the statute and the section making persons liable for damage accruing from allowing Texas cattle to run at large within the State, which latter section only was before the court:—

> "Section 4059, with which we are concerned, provives that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only leveled against allowing diseased Texas cattle held within the State to run at large. The defendants labored under the impression that the validity of Sec. 4058, which is directed against the importation into the State of such cattle unless they have been wintered north, is before us, and that a consideration of its validity is necessary in passing upon Sec. 4059, but this is a mistake."

See Kimmish *v.* Ball, 129 U. S., at pp. 220–221.

It is submitted that that case is so clearly distinguishable

from the case at bar that it can furnish no authority for a determination that the statute here in question is valid.

It seems to the petitioner that the case at bar presented, and upon a rehearing would afford, an opportunity for the assertion of a principle of what is and what is not a proper exercise of the police power of the State by way of quarantine or inspection laws to protect itself from the danger of infection from persons or cattle, and what is in its nature and essence as contradistinguished from this rightful exercise of the police power a burdensome imposition upon the interstate commerce, and therefore prohibited to be exercised by the States; and this principle is, that the State may, in the exercise of its police power, apply a most rigid scrutiny, in case of a well-recognized danger, of all that passes its border. This it does at great inconvenience to itself, and its good faith is evidenced, by the expense which it imposes upon itself for the safety of its citizens. If every train is stopped, investigated, fumigated, and its contents of passengers or cattle held for inspection or quarantine for a reasonable period, however onerous this may be, it is an incident of the exercise of the police power and must be borne by the transporter and consignees of the cattle, or by the transported and consigned, but on the other hand the State cannot neglect its own duty of investigation and scrutiny, free itself from all expense and throw upon the carrier a tyrannous burden by passing a law imposing upon said carrier a great loss in the interstate transportation of healthy, as well as unhealthy cattle, and call this the exercise of the police power for the safety of its citizens and their property, and this loss and injury to the carrier is imposed, although the carrier may have no reason to suspect in the transaction of his business of interstate commerce that the cattle which he transported are infected, and although he exercises every precaution and every care to prevent the carriage of infected cattle. The

Kansas law says in effect to the carrier: "If you do carry such cattle, and long after your connection with the act of transportation has ceased, notwithstanding you are free from negligence and the State has allowed them to come freely into its borders, if they communicate disease, you, the carrier, are responsible for an act which is entirely innocent on your part, and which is performed by you as part of your duty in interstate commerce transportation." This wrongful transfer of the duty which is due from the State to its citizens to protect their herds from the danger of contagion upon the carrier consitutes so onerous a burden that it seriously impedes the free movement of property the carriage of which is entirely proper, and is a duty which the carrier owes to the public. Such a law does not discriminate between healthy and diseased cattle, but imposes upon the carrier of all cattle a tax and a penalty more serious than any which has been presented to the consideration of this court in previous cases, and which in much milder forms have been visited with this court's condemnation.

Suppose the State of Kansas had passed an animal inspection law, and for the purpose of relieving itself of all expense had imposed a tax of two dollars a head on all sound or unsound cattle passing as interstate commerce through or into its borders, payable by all carriers into the treasury of the State, for the purpose of defraying the direct and incidental expense of such State inspection and for the general enforcement of the law, would not this court have declared such a law unconstitutional, because it is a tax on interstate commerce? Has not in effect the State of Kansas (by the law under consideration in the case at bar imposed upon the movement of cattle as an act of interstate commerce and carriage a risk of a penalty, and withal exacted contrary to the principle of the common law by a presumption of negligence resulting in verdicts for

large amounts), enacted precisely the same kind of a law as the clearly unconstitutional one, except that it is worse, as the Kansas statute is unequal and capricious in its operation, instead of having the merit at least of being an equal tax upon all carriers alike?

IV.

All legislation in Kansas touching Texas fever has been had since the Missouri Act of 1872 was decided unconstitutional by this court in Husen case (95 U. S.), in 1877. The Missouri statute, in its first section, provided against driving or otherwise conveying Texas cattle into "any county of the State," and in the ninth section, against bringing the cattle "into the State."

(See Missouri statute, 95 U. S. 465–6.)

The Kansas statute sued on provides only against driving or transporting Texas cattle "into or through any county of the State" (Section 6774, p. 13 our original brief), and the previous laws of Kansas (Sections 6754, p. 8, and 6771, p. 11, original brief) only relate to driving or keeping the Texas cattle "in any county of the State." Why did not the Kansas statute deal with the bringing of the Texas cattle "into the State" like section 9 of the Missouri statute? The first section of the Iowa law reviewed in Kimmish *v.* Ball dealt "with bringing the Texas cattle into the State," and the second section dealt only with "having the cattle in possession in the State." The court in deciding Kimmish *v.* Ball, expressly refrained from passing on first section. Therefore we contend that the legislative thought in Kansas was that the State could not legislate against bringing the cattle into the State, but could only deal with them after they came into the State.

The Missouri statute, in Sec. 1, in so far as it deals with the driving or otherwise conveying the cattle into "any

county of the State, is like the Kansas statute which prohibits the driving or transporting the cattle "into or through any county of the State." To more clearly express our idea, the Kansas statute in the respect indicated is a substantial re-enactment of the Missouri statute, but leaving out the prohibition in the Missouri statute that the cattle should not be brought into the State.

When Kansas adopted the Missouri statute it adopted the construction which the Missouri courts placed on their statute (See Interstate Com. Com. *v.* B. & O. Ry. Co., 145 U. S. 263).* As early as 1877, long before the Kansas legislation, the Missouri Supreme Court, in Surface *v.* H. & St. J. Ry. Co., 60 Mo. 216, had construed Sec. 3, relating to driving or conveying Texas cattle "into any county of the State," as follows: "Where Texas cattle "are during the prohibited season brought by a railway "company into one county of the State, and afterwards "transported by an owner, having no connection with the "road, into another county, such transportation under the "law would be a new offense independent of the first and "for disease communicated by the cattle while in the "county into which they had been so transported, the "company would not be liable."

The true construction of the Kansas statute is that it does not deal with the bringing of the cattle into the State and that the railroad company having brought the cattle into the State and delivered them to the owners, and they having driven them from Lyon to Chase county, and the disease having been communicated there long after the railroad company's act of transportation had ceased, the company is not liable.

The Kansas Supreme Court has construed its statute contrary to its meaning and in violation of well-settled

* See also Mo. Pac. Ry. Co. *v.* Haley, 25 Kan. 35. And McDonald *v.* Hovey, 110 U. S. 619.

rules of construction, and this court holds itself bound by such construction. What is the construction placed upon the Kansas statute to justify holding the railway company, nothing more nor less than that, for the mere bringing the cattle into the State with full notice to the quarantine officers of their coming, the railroad company is held for damages remotely occurring after the cattle had passed from the county where the company delivered them, into an adjoining county, because it might by the exercise of diligence, have known more than the owner or the expert official inspectors? If the Kansas court has construed its statute wrongfully,— this court should at least consider that fact in determining the injustice of the construed statute. The true construction of the Kansas statute should be ascertained by this court also to enable it to determine what was meant by the congressional legislation involved in this suit. Congress in Section 6 of the act dealt with the act of transportation by the railroad company from one State to another in the interest of the public to prevent the spread of the fever and to cover the act of interstate transportation which had not been covered and was supposed could not be covered by State legislation. If the Kansas act as construed held the company liable for anything it did or failed to do after the cattle were in the State there might be some reason to sustain it under the police power of the State. The only thing done by the company of which complaint is made was the act of interstate transportation and that the State could not deal with, Congress having undertaken to regulate it.

The record in this case fairly shows that the railroad company practically delivered the cattle in question into quarantine for the inspection of the Federal and State officers in Kansas, for they all knew they were coming and knew more about them and their liability to disease

than the company. The Kansas statute relating to quarantine show that it is expected that Texas cattle liable to communicate Texas fever will be brought into the State. Provisions are made for inspecting and seizing them, holding them in quarantine, keeping them excluded from other cattle, selling them at judicial sale, and turning them over to their owners when the dangerous time has passed. The facts recognized by the quarantine laws of Kansas that the cattle can be seized, sold at judicial sale, kept and the charges for their keeping made a lien upon them all show they are articles of commerce. Indeed the Kansas law recognizes that for the injuries done by the cattle liens shall arise in favor of the injured parties and they may be seized and sold as articles of commerce at judicial sale to pay the judgments for damages they themselves occasioned. In the present case the Texas cattle in question were proceeded against *in rem* and they were seized and sold at judicial sale, the claims of the claimants and costs and expenses of the case having been adjudged a lien against them. These cattle were much more articles of legitimate commerce than intoxicating liquors are in the prohibition States, for generally in those States such liquors are so outlawed as not to be the subject of either private or judicial sale. These cattle were property in and out of Kansas and subject to barter and sale. These cattle were wholesome food and could only do harm when brought in contact with the domestic cattle on the same range or in the same pastures.

Suppose a State statute made a railroad company, knowingly bringing intoxicating liquors into the State from another State liable for all injuries done by the liquors after they left the possession of the company and passed to the consignees or those claiming under them. Would there not be universal agreement that such statute would be unconstitutional as in conflict with the commerce clause of the

constitution of the United States? Would not such State legislation be directed against interstate commerce in intoxicating liquors? Would it not be a burden on such commerce? Would it not be a prohibition in part at least against such commerce? Would it be an answer to say that prohibition laws are justified under the police powers of the State and that such laws are to preserve the health and promote the morals of the citizens by withholding liquors from their consumption?

Has a brewer or distiller a higher right to have his products moved from State to State than a cattle raiser in Texas?

The Supreme Court of Kansas also violated a fundamental rule of statutory construction in holding the railroad company liable if it might have known by the exercise of diligence that the Texas cattle were capable of communicating the disease, though it may not have had actual knowledge.

The Kansas statute, reading both sections together, makes the company liable only when it has full knowledge or notice that the Texas cattle are capable of communicating disease. This is radically different from making the company liable, if it might, by the exercise of diligence, have known. In the one case the company knowing the cattle's capacity to communicate disease and then taking them into any county of the State, implies a wilfullness and reckless indifference to the rights of the owners of domestic herds that might well be made the ground for an action by a constitutional enactment. On the other hand if the company is required to ascertain by due diligence whether the cattle have a communicable disease then the burden of inspection by experts and the exercise of a very high degree of care is imposed upon the company. If the company with experts and scientists is required to examine the cattle when they are tendered for an interstate commerce shipment then a most burdensome enactment is imposed on

such interstate commerce and one that the State should not be permitted to impose specially when as we have shown Congress has regulated the subject by imposing a civil and criminal liability on the company for knowingly transporting the cattle from one State to another.

We again submit with due deference to the judgment of this court that in order to determine the questions under consideration in the case at bar, it should ascertain the true construction of the Kansas statute. Such an inquiry we contend will show that the Kansas courts have placed a wrong construction on their statute.

That the words "knowledge" or "notice" as in the Kansas statute, are not the equivalent of "might know" by the exercise of due diligence: — See Reg. *v.* Briggs, Dearl. & B. 98, where it was held that the word "known" used in a criminal statute was not the equivalent of "or had the means of acquiring knowledge if made use of." Much less is the word "known" equivalent to "might have known by the exercise of due diligence." In the civil cases Iron Silver Mining Co. *v.* Reynolds, 124 U. S. 374, and U. S. *v.* Iron Silver Mining Co., 128 U. S. 673, this court held that the words "known to exist" meant "actual knowledge" and not mere "belief." The reading of the opinions in these cases can leave no doubt that this court would not have construed the words "known to exist" as being the equivalent of "might by the exercise of due diligence have been known to exist."

The true construction of the Federal statute, as well as of the State statute, is that the company is only liable if it had actual knowledge.

Is not the true construction of these statutes high evidence that Congress and the Kansas legislature thought it unwise to burden interstate commerce with liability of the railroad company for what it might have known as distinguished from what it actually knew. If so can this court

sustain the Supreme Court of Kansas in placing this additional burden on interstate commerce by a wrong construction of its own legislation?

Finally we contend this court should consider the true construction of the Kansas statute as against the claimants' construction or Kansas court's construction in order to determine what law governs the civil liability of the railway company under the facts disclosed by this record.

The railway company has been held liable under a Kansas statute which does not really create any liability except by wrongful construction, when its liability, if any, is only under the Federal law and this suit is not based upon that law.

If the Kansas statute rightly construed does not make the railway company liable in this case then the *ipsi dixit* or fiat of the complainants or the Kansas courts cannot make it liable, Congress having regulated the liability, civil and criminal, of the company for transporting the cattle from one State to another, and such regulation being exclusive.

Congress has regulated the act of transportation by railroad companies of Texas cattle with a communicable disease, from one State to another, by prohibiting the same, and its prohibition, when violated, gives a civil right for damages and imposes a criminal penalty. The Kansas statute, as construed, permits the same kind of cattle to come into the State from another State and imposes a civil liability for damages resulting from bringing the cattle into the State, though such damages result after the cattle have left the possession of the company. The State, therefore, in defiance of the prohibition of the Federal act, permits, so far as it can, interstate commerce in these cattle, and then makes such an act of interstate transportation a ground of civil liability for damages caused by the cattle long after the carrier has parted with them. Is not

such imposition by the State of such onerous liability the rankest kind of a blow at the very act of interstate transportation which it has invited?

V.

Your petitioner respectfully submits that the above reasons are of sufficient importance to influence this court to grant a rehearing of the questions involved. The judgment rendered by this court if it is allowed to stand will be fraught with the most serious consequences, not alone to all railroad companies doing business in the southwestern section of the country, and to owners of domestic herds of cattle in the various States and Territories of the Union, but to the shippers and cattle-raisers of that region whose products no carrier under the rule announced by this court will hereafter be able to transport except under the most onerous and burdensome restrictions. And if by reason of any matter not having been sufficiently drawn to the court's attention the court has rested under a misapprehension as to any point involved, which misapprehension if cleared up might result in a different judgment, the importance of the case is, we submit, sufficiently great to justify a reargument.

Your petitioner therefore respectfully prays that this case be restored to the docket and a reargument ordered.

SIMON STERNE,
JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for the plaintiff in error, believing that the ends of justice would be served by a rehearing of this cause, and believing also that the facts and reasons stated in the petition for rehearing constitute a good ground for asking a rehearing of this cause, so certify in support of the petition, as required by the rule of this court.

SIMON STERNE,
JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.